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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 79-9

PLUMAS COUNTY BOARD OF SUPERVISORS and SUPERVISORS LARRY DEAN, RUSSELL PAPENHAUSEN, JOE W. CRIVELLO, OLE OLSEN, and LEONARD ROSS,
Petitioners,

VS.

PATRICIA R. HARRIS, Secretary of the United States Department of Health, Education and Welfare; MARIO OBLEDO, Secretary, Health and Welfare Agency, State of California; MARION J. WOODS, Director, Department of Benefit Payments, State of California; LAURA COOPER, HAZEL WILKS, and OTTILIA LOTT, as parties to Cooper, et al. v. Obledo, et al.; JOYCE YEE-LITT, THEODORE PARSONS, LENA OLIVIER, BEVERLY O'CAMPO, and RUBEN O'CAMPO, as parties to Yee-Litt, et al. v. Richardson, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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Petitioners Plumas County Board of Supervisors, *et al.* (Supervisors), file this reply brief to correct several misstatements of fact and law made by respondents in their briefs in opposition to the petition for certiorari.

ARGUMENT

I

NEITHER THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE NOR STATES MAY EXPAND AID TO FAMILIES WITH DEPENDENT CHILDREN ELIGIBILITY TO INELIGIBLE CATEGORIES

In their petition for certiorari, the Supervisors challenged the authority of the Secretary of the Department of Health, Education, and Welfare (HEW) to authorize states to provide optional Aid to Families with Dependent Children (AFDC) to categories not included within the Social Security Act's definition of "dependent child." 42 U.S.C. § 606(a). HEW's response to this charge of expanding AFDC eligibility to categories not intended to be included by Congress is to provide for further expansion of eligibility. HEW declares:

> "Section 406(a) of the Act, 42 U.S.C. 606(a), simply identifies the 'dependent children' who *must* be assisted if a state elects to participate in the AFDC program. If a state not only meets those requirments but also chooses to make AFDC benefits available to persons other than the ones receiving mandatory payments, federal law is not violated." Brief for the Federal Respondent in Opposition (HEW Opposition) at 5 (emphasis in original).

Thus, in addition to its position that HEW itself may select legislatively excluded categories and extend eligibility, HEW now says that the states may similarly expand the categories of AFDC eligibles. In California, unborn children are not mentioned in the state AFDC statutes but rather are made eligible through the administrative regulation of the State Welfare Department, EAS 44-213.31. The result of HEW's position is to grant burgeoning state welfare bureaucracies a license for further expansion by creating new categories on which to expend federal, state, and local tax monies, unrestrained by statutory limitations. It is this all too typical bureaucratic disregard of legislative limitations which has fueled the present inflationary crisis. HEW's position, therefore, reemphasizes the necessity that this Court review the question of administrative expansion of statutory categories of welfare eligibility.

II

INVALIDATION OF THE HEW REGULATION WOULD NOT INCREASE COUNTY COSTS BUT WOULD RESOLVE THE CONFLICT WITH THE SUPERVISORS' OATHS

In support of its challenge to the Supervisors' standing to challenge HEW's expansion of AFDC eligibility, HEW claims the Supervisors are not aggrieved in that if federal financial participation in the unborn child program were ended, California counties would simply have to bear twice their current financial burden for this program. HEW Opposition at 7. HEW further notes that the state unborn child regulations would remain unchanged even if the HEW unborn child regulation were invalidated. Both these statements are incorrect. The state regulation, EAS 44-213.31 (Petition for Certiorari at C-8), which makes unborn children eligible for aid does so by including the unborn child within the definition of children eligible for the federal AFDC program. If federal eligibility for the unborn were revoked, California would have to amend EAS 44-213.31 by

deleting unborn children from the definition of those eligible for the federal AFDC program.

Of course, as respondents argue, California could then determine to commence a new program, outside of AFDC, to fund unborn children. But under state law, such a program could not require the expenditure of county funds.

Section 2231(a) of the California Revenue and Taxation Code provides in pertinent part:

> "The state shall reimburse each local agency for all 'costs mandated by the state', as defined in Section 2207."

Section 2207 of the Revenue and Taxation Code in turn provides:

> "§ 2207. Costs mandated by the state, local agency
> " 'Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following:
>
> "(a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program;
>
> "(b) Any executive order issued after January 1, 1973, which mandates a new program;
>
> "(c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973."

Since a non-AFDC program for aid to unborn children would be a new program, implemented either by statute or executive order, the state would be required to reimburse

the counties, including Plumas County, for all costs required by the program. Thus, respondents' rationale that county costs would increase is in error; rather, costs to the county would have to be reimbursed by the state.

While HEW concentrated on the fiscal implications, it was unable to deal with the personal implications of the case to the Supervisors through the issue of violating their oath to uphold the laws and Constitution of the United States. Petition for Certiorari at 9-12. The Cooper, Wilks, and Lott respondents (Cooper respondents), however, attempt to rebut by stating that an order terminating federal financial participation for unborn children would not affect the Supervisors' obligation to provide AFDC to unborn children. Respondents' Brief in Opposition to Petition for Certiorari (Cooper Opposition) at 10. This statement is patently wrong. As the Cooper respondents note, California can establish an unborn child program with state funds. *Id.* What the Cooper respondents overlook is that such a program would not be AFDC which is established and governed by the Social Security Act. If the unborn child program were one strictly of state law, then there would be no issue of violating the oath to uphold the Federal Constitution and laws.

III

THE RULE 12(b) VIOLATION WAS FULLY PRESENTED TO THE LOWER COURTS

The Cooper respondents' opposition demonstrates an appalling lack of familiarity with this case. This is typified by their response to the Supervisors' argument that the lower courts' failure to exclude a certain affidavit in grant-

ing dismissal for failure to state a claim upon which relief may be granted violated Federal Rule of Civil Procedure 12(b). The Cooper respondents state that this issue was not presented either to the District Court or the Court of Appeals and should therefore be rejected. Cooper Opposition at 9. This statement is false. The Rule 12(b) error was specifically called to the District Court's attention in the Supervisor's Statement of Objections to Defendants' Proposed Findings and Judgment Dismissing Action. Record at 678. The District Court nonetheless adopted those findings and the judgment with minor pen and ink modifications. On appeal, the Supervisors devoted an entire section of their opening brief argument to the Rule 12(b) violation. Appellant's Opening Brief, Section III at 36-40. Since the most cursory examination of the record would have revealed these facts, the Supervisors believe that the Cooper respondents' statement that the issue was not presented to the lower courts demonstrates a woeful ignorance of this case.

The importance of the affidavit at issue lies in the fact that it directly contradicted the plain language of the statute and caused the lower courts to disregard that language which demonstrated the dependence of the California AFDC plan on federal financial participation. Respondents claim that the independence of the California welfare system was established by *Ross v. Superior Court,* 19 Cal.3d 899 (1977), and *California Welfare Rights Organization v. Brian,* 11 Cal.3d 237 (1974). HEW Opposition at 6; Cooper Opposition at 19. Respondents, however, cite no particular passage or even page in *Ross* or *Brian* for this proposition. The fact is that neither case pro-

claimed the alleged declaration of welfare independence. *Ross* merely cites *Brian,* noting that that decision was based on an interpretation of California's statutory welfare scheme (citing *Brian,* 11 Cal.3d at 240-41) and thus was not affected by this Court's decision in *Burns v. Alcala,* 420 U.S. 575 (1975). *Ross,* 19 Cal.3d at 909 n.7. The reason that *Ross* found that *Burns* did not affect *Brian* is that *Brian* merely notes that the HEW regulation permits but does not require states to include unborn children in their AFDC plan and California has elected to include unborn children in its AFDC plan. *Brian,* 11 Cal.3d at 240-41. This Court's decision in *Burns* that states are not required to include unborn children in AFDC, but reserving the question whether states are permitted to include them, thus did not affect the *Brian* analysis of the California program and this is what *Ross* is saying.

Thus, the key factor, in the District Court and Court of Appeals finding that the California welfare system is independent of the federal system and, therefore, would commence a new state financial unborn child benefit program, was the Horel affidavit. As the Supervisors pointed out to the Court of Appeals, citing *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 357 n.4 (1959), the effect of the Rule 12(b) error was to convert the motion to dismiss to a summary judgment motion and the Court of Appeals should therefore have considered the issue of the validity of the California unborn child regulation on its merits. Appellants' Opening Brief at 38-40. Similarly, this Court has jurisdiction to consider on its merits the issue whether the California unborn child regulation is viable and independent of federal financial participation.

CONCLUSION

The importance of this case extends far beyond the technical issue of whether unborn children may be paid AFDC benefits. The key issue is whether important governmental policies should be established by the public's elected representatives or by a faceless bureaucracy. The lower court decisions have elevated the welfare bureaucracy to a position in which it may not only override eligibility limitations established by Congress, but may immunize itself from challenge to the legality of these practices by the elected local officials who administer welfare. It is vital to the public interest that the increasing bureaucratic usurpation of legislative power be checked and that major policy decisions be restored to those officials who are directly responsible to the electorate. For this reason and for the reasons set forth in the Petition for a Writ of Certiorari, the Supervisors urge that certiorari be granted.

Respectfully submitted,

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